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International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and Its Local Lodge No. 376 (Colt's Manufacturing Company, Inc.) and George W. Gally.
Case 34-CB-1447-1 (Formerly Case 31-CB-8641-26)

June 18, 2004

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On December 24, 2003, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. The Respondents filed exceptions and a brief in support of exceptions. The Charging Party filed a cross-exception and a brief answering the Respondents' exceptions and in support of his cross-exception, and the General Counsel filed a brief in answer to the Respondents' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the judge's recommended Order as modified below.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondents, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and its Local Lodge No. 376, Hartford, Connecticut, their officers, agents, and representatives, shall jointly and severally make whole George Gally, in the amount of \$30,773, plus interest accrued to the date of payment.

¹ We have modified the judge's recommended Order to provide for joint and several liability, consistent with the relief ordered by the Board at 337 NLRB 237, 242 (2001).

Dated, Washington, D.C. June 18, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Thomas Quigley, Esq., for the General Counsel.
Michael Nicholson, Esq., for the Respondents.
W. James Young, Esq., National Right to Work Legal Defense Foundation, for the Charging Party.

SUPPLEMENTAL ORDER

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on October 23, 2003, in Hartford, Connecticut. The compliance specification herein issued on June 12, 2002, and, as amended, alleges that the net backpay due to George Gally is \$30,773 for the loss he suffered that was caused by his discharge from Colt's Manufacturing Company, Inc. (Colt), from the second quarter of 1991 through the fourth quarter of 1992. Respondent denies any liability to Gally.¹

A. Background

This case involving Gally was originally part of a nationwide case being handled by Region 31. On June 10, 1993, the General Counsel filed with the Board a motion to transfer case to and continue proceedings before the Board and for Summary Judgment. On June 16, 1993, the Board issued an order transferring proceeding to the Board and a Notice to Show Cause why the Motion for Summary Judgment should not be granted, and the parties filed briefs in response to this Order. On August 16, 1999, the Board issued a Decision and Order at 328 NLRB 1215 dismissing the consolidated complaint in its entirety. Stated simply, the Board dismissed the "local presumption" issue on the ground that the Respondents provided adequate support for their use of the local presumption. As regards Gally, he resigned his membership in Respondent in July 1985, and since that time he has been a nonmember. However, there was no complaint allegation, nor was it asserted, that he at any time exercised his right under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to the payment of dues and fees on nonrepresentational activities. The Board stated (328 NLRB at 1218-1219) that in *California Saw & Knife Works*, 320 NLRB 224 (1995), it held that:

[A] union is required to provide such information [the percentage of union funds spent in the last accounting year on nonrepresentational activities] only to nonmembers who choose to object to paying for union activities not germane to the union's duties as bargaining agent, i.e., after an objection

¹ Counsel for the General Counsel's unopposed motion to correct transcript is granted.

has been filed. . . . The record is clear that Gally had resigned his union membership but had not exercised his right under Beck to object to the payment of his dues and fees on nonrepresentational activities. Thus, the failure to provide Gally with this information did not violate the Respondent's duty of fair representation as embodied in Section 8(b)(1)(A) of the Act.

On June 9, 2000, the United States Court of Appeals for the District of Columbia Circuit, *Thomas v. NLRB*, 213 F.3d 651, decided that the Board was correct on the local presumption issue, but remanded the matter of Gally's discharge to the Board. The court stated (*id.* at 656):

After Mr. Gally's petition for review had been filed, the court issued Penrod,² holding that potential objectors like Mr. Gally are entitled to be informed of the amount by which their fees would be reduced were they to become Beck objectors. Board counsel acknowledges that the Penrod decision controls the disposition of Mr. Gally's petition, because the union never provided the required information to Mr. Gally. It is unclear, however, whether Mr. Gally is entitled to the remedy he seeks, given the Supreme Court's holding that objecting nonmembers are not excused from paying disputed agency fees until a final judgment is rendered in their favor. [See *Railway Clerks v. Allen*, 373 U.S. 113, 120 (1963).]

The court remanded Gally's case to the Board "to determine an appropriate remedy for the Union's statutory violation." On December 20, 2001, the Board issued a Supplemental Decision and Order (337 NLRB 237, 239), stating:

The court of appeals has thus, in effect, found that the Respondents' failure to notify Gally of the amount by which his dues would be reduced if he became a Beck objector prevented him from exercising his right to decide whether to become an objector. We accept the court's findings as the law of the case. The remaining question, as the court of appeals has recognized, is whether "Gally is entitled to the remedy he seeks."

The Board held (*id.* at 239–240):

We hold provisionally that Gally is entitled to a make whole order in order to remedy the violation found by the court of appeals. In the particular circumstances of this case, however, we shall afford the Respondents an opportunity to establish, at the compliance stage of this proceeding, that Gally was a "free rider," i.e., that he "willfully and deliberately sought to evade his union-security obligations." If the Respondents make this showing, Gally will not be entitled to any backpay. [Footnotes omitted.]

In explaining its decision, the Board discussed *Beck* and *California Saw* and stated (*id.* at 240):

However, even if it is established that a union has not fully complied with its fiduciary obligations with respect to enforcement of a union-security clause, the Board has consistently stated that it will not apply those requirements so rigidly "as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations as a union member." Thus, the Board will excuse a union's failure to fully comply with the notice requirements when it is shown that the employee involved was a "free

rider," who "willfully and deliberately sought to evade his union-security obligations."

The Board has not previously addressed the issue of whether Gally was a free rider. The case was presented to the Board on the General Counsel's Motion for Summary Judgment. There is, accordingly, no record evidence bearing on the circumstances under which Gally stopped paying dues, i.e., whether or not Gally would have paid any dues or fees even if he had been fully informed of his Beck rights. The Board did not address this issue in its prior decision in this case in light of its finding, on other grounds, that the Respondents' actions in causing Gally's discharge were not unlawful. Under the unique circumstances of this case, we shall afford the Respondents an opportunity to litigate Gally's alleged free rider status at the compliance stage of this proceeding. . . . If the Respondents can show in compliance that Gally would not have paid dues and fees even if he had been given a full Beck notice, that showing will relieve the Respondents from backpay liability. [Footnotes omitted.]

B. The Facts

The backpay period for Gally commences on April 11, 1991, when he was terminated by Colt at the request of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local Lodge No. 376 (the Union) and ends on October 9, 1992, when he was reinstated by Colt with the consent of the Union. The compliance specification, as amended, alleges that the total net backpay due to Gally for this period is \$30,773. At the commencement of the hearing, the Respondent amended its answer to admit that if backpay was warranted herein, i.e., if it is determined that Gally was not a "free rider," the backpay was appropriately calculated to be \$30,773.

Gally began his employment with Colt in 1961 and was a member of the Union until 1985, when he resigned his union membership. The Union commenced a strike against Colt in 1986; Gally honored the Union's picket line for 1 month and 2 days. After that, he crossed the picket line and worked for the balance of the strike. The strike lasted for approximately 4 years. At the conclusion of the strike, Colt settled charges that had been filed with the Board by reinstating the striking employees and paying a substantial amount of backpay to them. In addition, the Company was sold to a number of individuals, as well as the Union. The Union's ownership of the Company was distributed as stock to the employees.

In response to its request for legal assistance, the Union received a letter dated January 25, 1991, from an attorney in the International Union's legal department specifying the procedures to be followed prior to requesting the termination of employees for nonpayment of dues. By letter dated February 7, 1991, the Union sent the following certified letter to Gally:

Your Union, UAW Local 376 and your employer, Colt's Manufacturing Company, are parties to a collective bargaining agreement which requires under Article IV, that all union employees must pay union dues and fees as a condition of continued employment with Colt's Manufacturing Company.

² *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000).

Your Union dues are \$26.56 per month. Our records show that you owe the following amounts.

Month of	October '90	\$26.56
	November '90	\$26.56
	December '90	\$26.56
	January '91	\$26.56

You must pay this amount in cash or by check or money order at the Union office located at 30 Elmwood Court, Newington, CT 06111; or you may mail your check or money order to that address. The amount owed must be received by us on or before 30 days from the date of this letter. If your delinquent amount is not received by the Union on or before March 11, 1991, the Union will request that you be discharged pursuant to the terms of our collective bargaining agreement.

Gally did not respond to this letter nor did he pay the amount specified so, on March 18, 1991, the Union sent him another certified letter stating:

On February 8, 1991 you received a certified letter from UAW Local 376 regarding your unpaid dues. Under the terms of the current collective-bargaining agreement between UAW Local 376 and Colt's Manufacturing, an employee must pay dues as a condition of continued employment. If you fail to pay the delinquent amount of \$106.24 on or before March 28, 1991 the Union will request that the employer terminate you for failure to pay dues as required by the contract.

Please remit all delinquent amounts promptly to the Union office, as described in the February 7, 1991 letter.

Having received no response or payments from Gally, the Union, by Russel See, its president, wrote to Colt on April 1, 1991, stating that because Gally had failed to pay the uniformly required union dues, under the terms of its contract, "it is required that said employee be discharged" and he was discharged on April 9, 1991. By letters to Gally dated September 21 and October 5, 1992, Colt offered him reinstatement and he returned to work on October 9, 1992.

The principle subjects litigated herein was whether Gally was notified of, or knew of his *Beck* rights, and whether he attempted to become a *Beck* objector. On April 17, 1991, he gave an affidavit to the Board stating that at no time did the Union ever notify him of his right to pay a reduced rate to the Union for those who object to paying the full rate. Received in evidence was the International's newsletter for August 1989, which the parties stipulated Gally received. This newsletter contains an article entitled: "LEGAL NOTICE. UNION SECURITY AGREEMENTS. Notice to Nonmembers Covered by Union Security Agreements Regulated Under the National Labor Relations Act." This article describes the Union's expenses, explains *Beck*, and explains what individuals must do to become *Beck* objectors. Although these newsletters failed to state the amount by which his dues would be reduced if he filed a *Beck* objection, Gally testified that this deficiency did not cause his failure to file under *Beck*. The parties also stipulated that Gally received the union newsletter of June 1990, which contained an identical article about *Beck*. The Union's July 1992 newsletter contained a nearly identical, updated article about *Beck* and describes how individuals could become *Beck* objectors. Gally testified that he could not remember whether he received these newsletters, and his counsel would not stipulate that he received the July 1992 issue, since he was not em-

ployed by Colt at the time. However, the Union's witnesses testified that even though he was not employed by Colt at the time, he always remained on the Union's database and mailing list, and would have continued to receive all of the newsletters.

By letter dated November 6, 1992, counsel for the Respondent wrote to Gally briefly explaining *Beck*. The letter states, inter alia:

At the present time, as spelled out in the attached letter, the amount payable by non-member objectors to the UAW under the UAW objection procedures as required union security payments has been set at 82.40% of union dues. Notwithstanding your failure to file an objection with the UAW, the UAW has unilaterally determined to treat you as a non-member objector under the UAW's objection procedures who has filed an objection with the Union on October 6, 1992. This treatment is without prejudice to our right to claim that you are not entitled to such treatment in light of your failure to file an objection with the Union.

Our records show that your current rate of pay is \$13.74 per hour. Regular union dues for a person employed in a UAW bargaining unit at Colt with such an hourly rate are \$27.48 per month, or two times the hourly rate of pay. Reduced to 82.40% of union dues, the union security payment currently payable by you is accordingly \$22.64 per month.

You have so far not made any union security payment to the Union for the month of October 1992. Please make your payment of \$22.64 to the UAW no later than November 30, 1992. . . . If you fail to make this payment by this date, UAW Local 376 will request Colt to discharge you from employment pursuant to the union security clause.

By letter of the same date, the International notified Colt that it has deemed that Gally was a *Beck* objector effective October 6, 1992, and therefore his dues would be 82.40 percent of regular dues.

Gally never filed to become a *Beck* objector either before or after these series of letters. Since his reinstatement, Gally has paid the specified reduced dues, although sometimes these payments are late.

At the conclusion of the strike in 1990, Colt notified the Union that it would not accept the union-checkoff authorizations signed prior to the strike, so Colt conducted orientation meetings of employees where there were given an opportunity to sign new checkoff authorizations. Gally attended an orientation program on about April 2, 1990 where dues-checkoff authorizations were distributed by Diane Schell, a human resources representative of Colt. Gally testified that he told her that he wanted to do something different, he wanted an alternative to the checkoff of his dues. She responded that she was busy, but would get back to him, but never did. About a month later, he was approached by Higgins, the head of human resources at Colt, who offered Gally a checkoff authorization, and Gally told him that he had told Schell that he wanted an alternative and wanted to be a core member. Higgins did not answer, got angry and walked away. Gally was also asked to sign a check-off authorization by his immediate supervisor and he again refused. Subsequent to these conversations, in about October 1990, he met with two union representatives, Lester Harding, a shop chairman and Carl Ricci, whose position in the Union was not identified. He attempted to tell Harding about the checkoff authorization, but he wouldn't talk to him about it and walked

away. Ricci asked him if he was going to sign the checkoff authorization card and he said that he wouldn't, because he wanted to become a core member and had been attempting to become a core member since the orientation program in April. Ricci walked away and said that he would pass the message on.

C. Analysis

The sole issue herein pursuant to the Board's supplemental decision is whether Gally was a "free rider" who "willfully and deliberately sought to evade his union-security obligations." If so, he is entitled to no backpay. If it is determined that he was not a free rider, then he is entitled to backpay of \$30,773.

Initially, I find that it is a respondent's burden to establish that Gally was a free rider. In addition to the fact that a respondent generally carries the burden in backpay cases, the Board's language (337 NLRB at 240) herein makes clear that the Respondents here have that burden:

[W]e shall afford the Respondents an opportunity to establish, at the compliance stage of this proceeding, that Gally was a "free rider" If the Respondents make this showing, Gally will not be entitled to any backpay.

....

Under the unique circumstances of this case, we shall afford the Respondents an opportunity to litigate Gally's alleged free rider status at the compliance stage of this proceeding. . . . If the Respondents can show in compliance that Gally would not have paid dues and fees even if he had been given a full *Beck* notice, that showing will relieve the Respondents from backpay liability.

In affording the Respondents an opportunity to be free of any backpay liability if they can establish that Gally was a "free rider" the Board cited three cases: *Teamsters Local 630 (Ralph's Grocery)*, 209 NLRB 117, 125 (1974) (337 NLRB at 240 fn. 26); *Teamsters Local 251 (Ryder Student Transportation)*, 333 NLRB 1009 (2001) (337 NLRB at 237 fn. 3); and *I.B.I. Security*, 292 NLRB 648, 649 (1989) (337 NLRB at 237 fn. 31). In *Ralph's*, the administrative law judge, as affirmed by the Board, found that the charging party was aware of the union contract and that it contained a union-security clause and yet he still failed to pay the dues as required. The judge stated that a union's fiduciary duties of notifying employees of their obligations under the union-security clause "was never intended to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations." Further, the judge found that the charging party "willfully and deliberately sought to evade his union-security obligations [and] . . . engaged in a calculated attempt to evade the union-security obligations of the contract, as long as he was able to do so." The judge found that the term "free rider" aptly described the charging party.

In *I.B.I.*, the Board found that the charging party was aware that the employer had a union contract, and was told by his employer and a union representative on a number of occasions that he had to join the union and pay an initiation fee to the union. When he failed to do so, the union requested that the employer terminate him, which it did. In dismissing the complaint, the Board found that although the union may not have satisfied all the requirements of *Philadelphia Sheraton*, 136 NLRB 888 (1962), that does not preclude them from dismissing the complaint. Citing *Ralph's*, the Board stated (292 NLRB at 649):

Moreover, even if the Union did not fully comply with its fiduciary obligation, the Board never intended these requirements "to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations as a union member." . . . Thus, the Board will excuse a union's failure to fully comply with the notice requirements when it is shown that the employee involved has "willfully and deliberately sought to evade his union-security obligations."

In *Ryder*, a *Beck* case, one of the alleged discriminatees was notified on three occasions, beginning a month or two after he was hired, that he had to join the union. When threatened with termination for his failure to join the union 4 months after his employment began, he agreed to join, but refused to pay back dues and he was terminated. The administrative law judge found him to be a "classic free rider," but he and the Board found that his termination violated Section 8(b)(1)(A) of the Act because the union never notified him and the other charging parties of their rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), to be dues-paying nonmembers of the union or of their *Beck* rights. Further, in *Seafarers (Tomlinson Fleet Corp.)*, 149 NLRB 1114, 1119–1120 (1964), the trial examiner stated:

A cardinal purpose of union-security provisions in collective-bargaining contracts is to distribute equitably the cost of union representation among those benefiting thereby, or, in other words, to eliminate the "free rider," i.e., the employee who, while content to receive the benefits of union representation, is unwilling to bear his fair share of the cost thereof.

The trial examiner in *Seafarers* later defined a free rider as one who "was motivated solely by his aversion to paying any part of his dues obligations and would not have complied even with a proper demand."

Two cases cited by counsel for the General Counsel in his brief are also helpful: *Teamsters Local 150 (Delta Lines)*, 242 NLRB 454 (1979), and *Western Publishing Co.*, 263 NLRB 1110 (1982). In *Delta*, 242 NLRB at 455, the Board discussed a union's notice obligations to employees and stated:

The instant facts clearly reveal that Respondent failed to meet its obligations to Lowd [the charging party]. They further reveal that no bad faith was shown to have existed on Lowd's part. In this regard, we note, in particular, that Lowd, on a number of occasions, asked Respondent's designated steward of his obligations and the steward told him he did not know what Lowd's obligations were. Further, Lowd undertook other inquiries which also proved fruitless.

In a similar fashion, the Board, in *Western*, 263 NLRB at 1113, stated:

[W]hen it is shown that the employee involved has "willfully and deliberately sought to evade his union-security obligations," the Board will excuse a union's failure to fully comply with the notice requirements.

In the present case, however, neither the conduct of Jackson, nor even that of Russ [the charging parties], rises to the level of bad faith, or a willful and deliberate attempt to avoid his respective dues obligations. Indeed, both employees were less than diligent in their attempts to correct

their delinquencies. In this regard, Russ was especially cavalier in his attitude, leaving for vacation with the matter still unresolved. Yet, we have held that mere negligence or inattention on the part of the employee is not enough to relieve the union of its fiduciary obligation. Here, both employees took the initiative to contact Respondent Union when notified by Respondent Employer of their delinquencies, and, although they may have done more to ameliorate the situation, neither Jackson's conduct, nor that of Russ, evidenced a conscious choice to avoid his obligations so as to excuse the multiple deficiencies in Respondent Union's notice procedure.

These cases establish that the Board has set the bar high for the Union's defense herein, and I find that the Respondent's have not met this burden. Gally was a member of the Union from about 1961 until 1985, when he resigned his union membership; he never filed to become a *Beck* objector. The evidence establishes that beginning in August 1989, and continuing through, at least July 1992, Gally received the Union's newsletter which described the Union's expenses and how individuals could become *Beck* objectors. However, the evidence also establishes that beginning in April 1990, on two separate occasions, Colt representatives refused to assist him when he refused to sign a dues-checkoff authorization and said that he wanted to do something different, he wanted "an alternative." Further, about 6 months later, two union representatives refused his similar request for assistance to become a *Beck* objector. The evidence therefore establishes that although Gally was

notified of the *Beck* procedures by the Union's newsletters beginning in August 1989, when it came time to either sign a dues-checkoff authorization or become a *Beck* objector at the Colt orientation meetings beginning in April 1990, neither the Colt representatives nor the union representatives would assist him with the procedures required to become a *Beck* objector. It is true that Gally could possibly have done more between April 1990 and November 1992 (when the Union decided, unilaterally, to treat him as a *Beck* objector), such as following the instructions contained in the union newsletters or obtaining legal advice on how to file to become an objector, and that his "innocence" and good faith are questionable because of his failure to respond to the Union's two letters in February and March 1991 notifying him of his dues delinquencies. However, because both the Union and Colt refused to help him beginning in April 1990, I find that he did not "willfully and deliberately attempt to evade his union-security obligation" during this period, and that he therefore was not a "free rider." I therefore find that the backpay due to Gally is \$30,773, plus interest accrued to the date of payment.

ORDER

The Respondents, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local Lodge No. 376, shall jointly make whole George Gally in the amount of \$30,773, plus interest accrued to the date of payment.

Dated, Washington, D.C. December 24, 2003